IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No 143 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MERCURY METALS (P) LTD.

Versus

A.C.I.T.

Appearance:

MRS SWATI SOPARKAR for the Petitioner.

MR BB NAIK for the Respondent.

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE KUNDAN SINGH

Date of decision: 26/03/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI)

Admit. The following question of law is formulated.

> Has the Tribunal committed an error in exercise of its jurisdiction in setting aside the appellate order of C.I.T.(Appeals) without taking into consideration the reasons for which that order was made ?

2. At the request of the learned counsel appearing for both the sides, since the matter involves a short point, it has been taken up for final disposal.

3. The matter pertains to the assessment year 1990-91 for which the appellant had declared on 21st October, 1991, a total income of Rs. 1,06,542/-. The assessment was however, made for the income of Rs. 3,10,950/-. An addition of Rs. 2,27,832/- was made by the Assessing Officer by that assessment on account of sales of scrap outside the books of accounts on the ground that the shortage/wastage claimed by the appellant was more than the actual. The C.I.T. (Appeals)-XII, Ahmedabad allowed the assessee's appeal and deleted the addition of Rs. 2,27,832/-. The Tribunal partly allowed the appeal of the Revenue and sustained the addition to the extent of Rs. 1,50,000/- in the following manner:

> "5. After considering the rival submission and going through the material on record, we find that for A.Y. 1989-90 the assessee has admitted the shortage of 0.5% since no appeal was preferred. The assessee has not brought anything on record contrary to the finding of CIT(A) for A.Y. 1989-90. We also find that regarding shortage of lead, MG Silicon and wastage of tin etc., the CIT(A) has applied his common sense only while arriving at the conclusion in his appellate order. Taking into account whole circumstances of the case we sustain addition of Rs. 1,50,000/- on account of claim of excess, wastage of scrap of copper, lead, MG Silicon and tin anode.
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> 6. In the result, the appeal is partly allowed."

From the above reasons, it appears that the only ground on which the Tribunal set aside the order of C.I.T.(Appeals) is that he had applied his common sense only while arriving at the conclusion in his appellate

order. While doing so, the Tribunal itself has sustained the addition to the tune of Rs. 1,50,000/- without even resorting to common sense and just ipse dixit, totally oblivious of the reasoned order of the C.I.T. (Appeals). This is evident from the reasoning given by C.I.T. (Appeals) in para- 4.3 of his order which is re-produced hereinbelow with a view to emphasis the cursory manner in which the appellate Tribunal has brushed aside the order without even verifying the reasons given by the learned appellate officer.

" 4.3. I have considered the facts and the submission made by the counsel for the appellant. The Assessing Officer has obviously made the estimate of shortage on the basis of the shortage held as reasonable in copper in the appellant's case for A.Y. 1989-90 by the Commissioner of Income tax (Appeals). He has not considered the relevant factors which lead to the shortage and whether the shortage in this year of 1.38% in copper in excessive and if so the reasons for the same. It is admitted fact, as will be seen from the Assessment order, there was not trading in lead and MG Silicon in A.Y. 1989-90 and, therefore, no comparison can be made in regard to the shortage in these items with that of A.Y. 1989-90. The materials are also totally different and, therefore, shortage cannot be compared with that of copper. In fact, the Assessing Officer has not brought any evidences on record in support of the estimate of 0.5% as reasonable in regard to the shortage for lead and MG Silicon. On the other hand, the appellant in support of the submission produced before me the samples of copper, manganese brass and silicon, and after seeing the samples. I am entirely in agreemenmt that there is presence of moisturized content in the form of mud and plastic coating which need to be removed to make them acceptable lot in the market through the process of burning and subsequently made to coal by pouring water where by material is subject to oxidization. It is also correct that this has to be followed by cleaning, sorting, handling manually by labourers. From the samples of the manganese metals, produced, I find that they are in uneven sizes as claimed and its physical properties will not have uniform quality standards. It is also subject to oxidization whereby the flakes are formed into powder. From the sample of lead scrap, it is found that the goods will have attachment like coal tar, greasy paper coating

used on iron strapped copper cable consumed by Electricity Board and the impurities could be separated only through the process of burning and manually cleaning process. I also agree with the appellant that calculation of shortage criteria should be based on purchases and not on sales. Considering these relevant facts and the evidence produced, I am of the view that the shortage as claimed under various items is neither excessive nor unreasonable. "

We refrain from commenting on the correctness or otherwise of the order of the C.I.T.(A) because, we propose to remand the matter to the Tribunal for re-consideration on the ground that it has committed an error in exercise of its jurisdiction by not calling its attention to the above reasoning given by the C.I.T. (Appeals) against whose order the appeal was preferred by the Revenue for its consideration.

4. We may recall here the decision of the Supreme Court in Omar Salay Mohamed Sait vs. Commissioner of Income-tax, Madras reported in 37 I.T.R., 151 in which the Supreme Court succinctly expressed the expectation from a Tribunal while deciding such appeals.

"We are aware that the Income-tax Appellate Tribunal is a fact finding Tribunal and if it arrives at its own conclusion of fact after due consideration of the evidence before it this court will not interfere. It is necessary, however, that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence on record before it. The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings, even though on questions of fact, will

be liable to be set aside by this court."

5. In Rajesh Babubhai Damania Vs. C.I.T.(Gujarat), 3 reported in 251 I.T.R., 541, the Division Bench of this Court observed that it was a duty of the Tribunal to ascertain the reasons which were given by the Commissioner of Income-tax (Appeals) in whose order, the order of the Assessing Officer had merged.

6. We are therefore, of the view that the impugned order cannot be sustained and the Tribunal should re-consider the matter on merits in accordance with law. The appeal is therefore, allowed. The impugned order is set aside with a direction to the Tribunal to re-consider the Revenue's apeal no. ITA 1605/AHD/1995 and take a decision in accordance with law expeditiously. There shall be no order as to costs.

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